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**Chua Eng Hong & Anor v
Palm Springs Development Sdn Bhd**

HIGH COURT (KUALA LUMPUR) — SUIT NO S2(S1)–22–365 OF 1999
KAMALANATHAN RATNAM J
2 MAY 2001

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Land Law — *Housing developers — Delay in completion — Termination of contract — Time of essence — Developer failed to show reasons for delay — Developer must apply to controller and furnish reasons for non compliance, whether includes frustration — Whether summary judgment for plaintiff for refund of monies paid*

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The plaintiffs and the defendant entered into a sale and purchase agreement, whereby the plaintiffs agreed to buy and the defendant agreed to sell a condominium unit for a purchase price to be paid in stages, in accordance with the terms of the agreement. The defendant expressly agreed to complete and deliver vacant possession of the property together with connection of water and electricity supply within a stipulated time, and time was deemed to be of the essence. The defendant failed to comply with the above terms. The plaintiffs then gave the defendant notice of termination of the agreement and claimed refund of monies paid and fees and costs incurred. The plaintiffs also sought a declaration that they had effectively terminated the agreement and also prayed for damages, interest and costs. The senior assistant registrar ('the SAR') dismissed the application for summary judgment. The plaintiffs appealed.

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Held, setting aside the order of the SAR:

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Having perused the affidavits of the defendant, the court noted that the defendant had failed to show why it was unable to complete within the required period. In any case, even if it could show the reason, that did not provide it a way out. It still ought to apply to the controller for a waiver by showing to the controller why it was unable to comply. The special circumstances referred to in the proviso to reg 11(3) of the Housing Developers (Control and Licensing) Regulations 1989 can mean the doctrine of frustration, but it was not for this court to decide on the issue of frustration. That ought firstly to be raised before the controller (see p 466G–H).

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[Bahasa Malaysia summary]

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Plaintif-plaintif dan defendan telah memasuki satu perjanjian jual-beli, di mana plaintiff-plaintif telah bersetuju untuk membeli dan defendan bersetuju untuk menjual sebuah unit kondominium dengan harga belian yang akan dibayar secara berperingkat, menurut terma-terma perjanjian. Defendan dengan nyata bersetuju untuk menyelesaikan dan menyerahkan milikan kosong hartanah bersama sambungan bekalan air dan elektrik dalam tempoh masa yang ditetapkan, dan masa adalah asas. Defendan telah gagal untuk mematuhi terma-terma

di atas. Plaintiff-plaintiff kemudiannya telah memberikan defendan notis penamatan perjanjian dan menuntut pengembalian wang yang telah dibayar dan yuran dan kos yang telah dikenakan. Plaintiff-plaintiff juga memohon satu deklarasi bahawa mereka telah menamatkan perjanjian dengan berkesan dan juga memohon ganti rugi, faedah dan kos. Penolong kanan pendaftar ('SAR') menolak permohonan untuk penghakiman terus. Plaintiff-plaintiff telah merayu.

Diputuskan, menetepikan perintah SAR tersebut:

Setelah meneliti affidavit-afidavit defendan, mahkamah mengambil kira bahawa defendan telah gagal untuk menunjukkan kenapa ia tidak dapat menyelesaikannya dalam tempoh yang ditetapkan. Dalam apa keadaan, walaupun ia dapat menunjukkan sebab, ini tidak memberikannya jalan keluar. Ia masih patut memohon kepada penguasa (controller) untuk satu penepian dengan menunjukkan kepada penguasa kenapa ia tidak dapat mematuhi. Keadaan khas yang dirujuk dalam proviso kepada peraturan 11(3) Peraturan-Peraturan (Kawalan dan Perlesenan) Pemaju Perumahan 1989 bermaksud doktrin kekecewaan, tetapi ia bukan untuk mahkamah memutuskan persoalan kekecewaan. Ia sepatutnya terlebih dahulu ditimbulkan kepada penguasa (lihat ms 466G-H).]

Notes

For a case on delay in completion, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) para 2450.

Legislation referred to

Housing Developers (Control & Licensing) Regulations 1989 reg 11(1), (3)

Rules of the High Court 1980 O 14 r 3

Wong Hok Mun (Azim, Tunku Farik & Wong) for the appellants/plaintiffs.

Eugene Roy Joseph (William Leong) for the respondent/defendant.

Kamalanathan Ratnam J.: The plaintiffs, as purchasers, and the defendant, as developer/vendor, entered into a sale and purchase agreement on 5 January 1995 whereby the plaintiffs agreed to buy and the defendant agreed to sell a fully completed condominium unit known as Unit No BV-013-2 Riverine Villas, Palm Springs Resort, Port Dickson, held under the master title HS(D) 12925 Lot No PT 2873 Mukim Pasir Panjang, District of Port Dickson, Negeri Sembilan ('the property') for a purchase price of RM368,995 to be paid in stages, and by instalments in accordance with the architect's certificates and in accordance with the terms of the agreement.

Amongst the express terms of the said agreement were the following, namely:

- A (a) That in accordance with cl 22(1) of the agreement, the defendant agreed and was thereby required to complete and deliver vacant possession of the property together with connection of water and electricity supply within 36 calendar months from the date of the agreement.
- B (b) That in accordance with cl 24 of the agreement, the defendant agreed and was thereby required to complete the common facilities of the property within 36 calendar months from the date of the agreement.

C It was also an express term of the agreement in accordance with cl 7 that time was of the essence. The plaintiffs and the defendant also entered into a deed of covenant on the same day the agreement was signed for the use of the Golf Club and Marina Club facilities. The defendant failed to complete and deliver vacant possession of the said property and also failed to complete the common facilities within the stipulated time. The plaintiffs then gave the defendant notice of termination of the agreement by their solicitors' letter dated 13 April 1999 and claimed the following:

D	(1) Refund of monies paid by the plaintiffs to the defendant and/or agents of the defendant towards purchase of the property, refund of utility deposits and legal fees incurred by the plaintiffs towards purchase of the property	RM295,637.95
E	(2) Financing costs incurred by the plaintiffs towards purchase of the property from 28 September 1994 to 26 June 1998 inclusive of interest at the rate of 10%pa	RM64,847.96
	(3) Refund of monthly Golf Club subscriptions paid by the plaintiffs from February 1998 to October 1998	RM756.00
	Total	<u>RM361,241.91</u>

F The plaintiffs also sought a declaration that they had effectively terminated the agreement and also prayed for damages, interest and costs. The plaintiffs then took out a summons under O 14 r 3 of the Rules of the High Court 1980 ('the RHC') and prayed for judgment for RM295,637.95 and costs.

G On 26 January 2000, the learned senior assistant registrar ('SAR') heard and dismissed the said application for summary judgment. The plaintiffs appealed.

The appeal

- H There is no denying the fact that the plaintiffs had indeed paid the sum of RM295,637.95. Counsel for the defendant/respondent confirmed this as correct. It is also not in dispute that the time for completion had long since expired. Since the agreement was signed on 5 January 1995, the 36 months being the completion period would have been 4 January 1998.
- I The defendant pleaded frustration and argued that as the soil on which the condominium was constructed was of such a nature, it would be impossible to complete the construction within the 36 months provided.

Mr Joseph for the respondent confirmed that this was his only defence before me. A

Mr Wong for the appellant pointed out that since the agreement was in the statutory form in compliance with reg 11(1) of the Housing Developers (Control & Licensing) Regulations 1989 and the period of completion had been stipulated as 36 months and time being stipulated as being the essence of the contract, the defendant ought to have completed the condominium within the stipulated period. It is necessary for a proper consideration of the respective submissions to reproduce reg 11. It reads as follows: B

11 Contract of sale

- (1) Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisinal portion of land appurtenant thereto shall be in the form prescribed in Sch G and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, it shall be in the form prescribed in Sch H. C
- (2) No housing developer shall collect any payment by whatever name called except as prescribed by the contract of sale. D
- (3) Where the Controller is satisfied that owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary, he may, by a certificate in writing, waive or modify such provisions: E

Provided that no such waiver or modification shall be approved if such application is made after the expiry of the time stipulated for the handing over of vacant possession under the contract of sale or after the validity of any extension of time, if any, granted by the Controller. F

Having considered the said regulation, I accept the submission of the appellant that for the controller to waive the period of 36 months and to give such further extended time as is necessary, the defendant ought to have applied for such extension under reg 11(3). Unfortunately, the defendant has not in any of its affidavits provided any evidence that: (a) such an application had been made; (b) that it was made before the expiry of the 36 months; (c) that it was made before the expiry of the 36 months; and (d) that the controller had waived or modified such compliance. Having perused the affidavits of the defendant, I note that the defendant has failed to show why it was unable to complete within the required period. In any case, even if it can show the reason, that does not provide it a way out. It still ought to apply to the controller for a waiver by showing to the controller why it is unable to comply. The special circumstances referred to in the proviso to reg 11(3) can mean the doctrine of frustration, but it is not for this court to decide on the issue of frustration. That ought firstly to be raised before the controller. G H

When asked by the court as to what the present position of the said project is, counsel for the defendant requested for time to file an affidavit. I did not see the need to adjourn on that score. Since the defendant had failed to show it had complied with reg 11(3), I set aside the order of the learned SAR given on 26 January 2000 and entered judgment for the I

A plaintiffs in the undisputed sum of RM295,637.95 and decided that the case do proceed in respect of the rest of the prayers. I also awarded the plaintiffs the costs of the appeal and fixed a date for case management.

Order accordingly.

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Reported by Wong Ee Lynn

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